NO. 83-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GERALDINE FENNELL,
on behalf of herself and all others similarly situated,

Petitioner,

—against—

WARNER-LAMBERT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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July 10, 1984

Question Presented for Review

Did the District Court, in May 1983, abuse its discretion in dismissing, for lack of prosecution, a complaint filed in June 1977 based upon events which are alleged to have occurred between 1971 and 1974, where:

(a) except for limited document production, no discovery had taken place in the action since it was filed in June 1977; and

(b) no discovery whatsoever had taken place since February 1979; and

(c) plaintiff had taken no action to prosecute the action since April 1979; and

(d) plaintiff had engaged in a running dispute with her counsel since May 1979, but adamantly refused either to discharge counsel, permit him to withdraw or permit him to proceed with the case; and

(e) plaintiff failed to take any action to prosecute the action for a period in excess of twenty months after a notice was issued in April 1981 by the District Court pursuant to a local rule, requiring plaintiff to take action or submit a satisfactory explanation as to why the case should not be dismissed; and

(f) such lengthy delay prejudiced defendant?

Rule 28.1 Statement

TO BE SUPPLIED

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This brief is submitted on behalf of respondent Warner-Lambert Company ("Warner-Lambert") in opposition to the petition for a writ of certiorari.

Rules Involved

Rule 41(b), Federal Rules of Civil Procedure, provides in relevant part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 16(a), Rules of Civil Procedure of the United States District Court for the District of Connecticut, in the form in which it existed at all times relevant to this case,* reads:

> *Rule 16. Dismissal of Actions by the Clerk.*
>
> (a) *For Failure to Prosecute.* In civil actions in which no action has been taken by the parties for one year, the Clerk shall give notice of proposed dismissal to counsel of record. If such notice has been given and no action has been taken in any civil action in the meantime and no satisfactory explanation is submitted to the Court within thirty days thereafter, the Clerk shall enter an order of dismissal. Any such order entered by the Clerk under this rule may be suspended, altered, or rescinded by the Court for cause shown.

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* Rule 16(a) was amended effective January 1, 1984.

Statement of the Case

On June 17, 1977, Geraldine Fennell ("Fennell") commenced this action, charging that she was discharged in 1974 because of sex discrimination and in reprisal for events which are alleged to have occurred in 1971. Although she appeared in the Court of Appeals and appears in this Court *pro se,* Fennell was represented by counsel throughout the entire litigation until the case was dismissed in May 1983 for lack of prosecution.

At the time Warner-Lambert filed its motion to dismiss, the case was five and one-half years old. Yet, except for production in 1977 and 1979 of a small number of documents (A29-A62; A126),* there had been no discovery in the case whatsoever. A brief description of the events leading to this situation follows:

On August 9, 1977, less than two months after the commencement of the action, Warner-Lambert filed a request under Rule 34 for documents (A22-A24). Numerous categories of documents were objected to, including all documents relating to plaintiff's employment and termination. Obviously, such documents are among the most highly relevant documents in an employment discrimination case. Yet, Fennell objected to their production (A27), and even now takes the position (Petition, pp. 3-4) that she was not required to produce such documents because defendant should first have specified which of those documents were in its possession.

In May 1978, Fennell served extensive interrogatories on defendant, approximately half of which were later

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* Citations are to the appendix filed by Warner-Lambert in the Court of Appeals for the Second Circuit.

stricken by the District Court, and defendant noticed Fennell's deposition for July 1978, which was thereafter adjourned at Fennell's request because her then counsel had announced plans to move to Massachusetts. On October 30, 1978, new counsel, Frank Cochran, filed his notice of appearance on behalf of plaintiff (A63).

On November 15, 1978, new counsel for plaintiff conferred with counsel for defendant about the status of discovery in the case. As a result of that conference, it was agreed that discovery would proceed in the following sequence: production of documents first, to be followed by plaintiff's deposition; after which defendant would respond to plaintiff's interrogatories, if necessary. This agreement was set forth in a contemporaneous letter of Warren Eginton, Esq., then counsel for defendant, which states in relevant part (A121-A122):

> This will confirm our agreement on the following procedures in the above matter, as reached during the course of our conference this morning at your office.
>
> With respect to the outstanding documents which have not yet been produced under our Rule 34 request dated August 5, 1977, we will furnish you within the next couple of weeks with an itemization of those categories which we have not as yet received. . . . In responding to that letter, we would appreciate it if you would indicate a time frame within which you will either produce the documents or otherwise state the position of your client with respect to such production.
>
> With respect to your desire to examine certain documents from the files of Warner-Lamber, I understand that you will send me a letter within

> the next couple of weeks setting forth the categories of such documents and we will advise you of a reasonable time frame for production or of our position with respect to such production.
>
> We have agreed that the deposition of Dr. Fennell will proceed after the above-referenced document exchange has been completed, and tentatively during the latter part of January, 1979 on a mutually agreeable basis.
>
> Finally, we have agreed to defer the filing of Warner-Lambert's response to plaintiff's first interrogatories dated May 3, 1978 in view of our common expectation that the document exchange and the plaintiff's deposition may render superfluous responses to many, if not most, of the outstanding interrogatories. Accordingly, I enclose herewith a stipulation. If you find it to be satisfactory, will you kindly complete the execution and file it with Mr. Markowski's office.

In connection with this agreement, plaintiff's counsel signed the enclosed stipulation and filed it with the District Court. On November 21, 1978, the stipulation was ordered accordingly by the District Court (A64). The stipulation provided that defendant need not respond to plaintiff's interrogatories unless and until there was a further application for compliance, with proper opportunity for defendant to respond.

On December 19, 1978, Fennell filed a motion for partial summary judgment to deny or strike certain affirmative defenses asserted by Warner-Lambert based upon plaintiff's failure to timely file her charges of discrimination and her failure to file any charge of retaliation

with the EEOC, as required by law (A65). During the course of preparing its response, defendant requested and obtained from plaintiff in February 1979 several documents relevant to those affirmative defenses which had been sought in its request in August 1977 (A123-A126). Plaintiff's counsel, however, suggested that any further discovery be postponed until plaintiff's motion for partial summary judgment was decided, stating that he would "resist all further discovery requests preceding that motion" (A126). Defendant's counsel agreed to defer further discovery pending disposition of the motion.

On April 23, 1979, Fennell's motion for partial summary judgment to deny or strike the affirmative defenses was argued before the District Court. On January 3, 1980, in a ten-page memorandum of decision, the District Court denied Fennell's motion (A69-A79).

In accordance with the earlier agreements of counsel, the road was now clear to resume discovery. During the next three years, however, Fennell failed to proceed with discovery as previously agreed and appears to have devoted her attention to a dispute with her attorney, whom she refused to allow either to withdraw from or to resume work on the case.

In May 1979, several weeks after the argument of plaintiff's motion for partial summary judgment, plaintiff's counsel told Fennell that he wished to withdraw as her attorney and she should seek other counsel (Petition, pp. 6-7). On December 14, 1979, Fennell's counsel filed a motion requesting leave to withdraw (A66-A67). On June 20, 1980, while that motion was still technically pending, plaintiff's counsel filed a second motion for leave to withdraw as counsel (Petition, p. 7), which Fennell opposed despite the fact that her counsel had explained to her, on numerous occasions, why he no longer wished

to represent her (A84). On October 22, 1980, a hearing was held before the District Court, of which defendant had no notice at the time, and at which only Fennell and her counsel appeared (A83-A91).

Fennell adamantly refused to agree to her counsel's withdrawal. Indeed, shortly after the October 22, 1980 hearing, Fennell wrote a lengthy letter to the District Court, again requesting that her counsel's motion be denied (A92-A93), and the following month, the District Court acquiesced (Petition, p. 7).

Having thus persuaded the District Court to deny counsel's motion to withdraw, Fennell nevertheless refused to let him proceed with the case. As Fennell herself stated in her principal brief on appeal before the Court of Appeals for the Second Circuit (Brief, pp. 18-19):

> Freely, to have gone along with Mr. Cochran's withdrawal as counsel on the grounds that I distrusted him or, following Judge Burn's denial of his (first) motion to withdraw, to have allowed him to resume work on my case as though the whole episode had not happened and in the light of his subsequent response to my questions (ROA 38), or to have released him, left too many questions unanswered. I felt that my actions from then one [sic] under any of the three options, would not be the informed actions of a responsible person.

It thus appears that the failure to proceed with discovery subsequent to the November 1980 denial of counsel's motion to withdraw stemmed directly from Fennell's refusal to allow her counsel to resume work on the case.

In December 1980, plaintiff's counsel made some attempt to deal with the situation. He inquired of counsel for Warner-Lambert concerning the taking of plaintiff's depo-

sition. On January 13, 1981, Warner-Lambert responded, reiterating its desire to take Fennell's deposition as soon as possible after Fennell produced documents in response to its request dated August 5, 1977. In response, Fennell's attorney acknowledged the 1978 agreement respecting the sequence of discovery and stated by letter dated January 19, 1981, a copy of which is shown as being sent to Fennell, that: "I will respond to your inquiry concerning production of documents as soon as I have instructions from my client regarding that issue." (A131) (See Petition, pp. 7-8).

There was, however, no response from plaintiff's counsel until almost two years later at a status conference before the District Court on December 14, 1982 where plaintiff's counsel indicated that no documents would be produced (A117-A118). In his affidavit of January 7, 1983, plaintiff's counsel confirms that, as of December 14, 1982, "he had no authority to agree to produce documents not already produced" (A136).

On April 29, 1981, more than a year and a half before the December 14, 1982 status conference, the Clerk of the District Court had issued a notice under Local Rule 16 of proposed dismissal for plaintiff's failure to prosecute (A94). Thereafter, in response to a letter from plaintiff's counsel, the Clerk extended until September 22, 1981 the date by which plaintiff was required to take some action in the case or furnish a satisfactory explanation as to why the action should not be dismissed (A96). The September 22, 1981 date arrived, but no action to prosecute the case had been taken and no explanation had been given as to why the action should not be dismissed.

On December 22, 1981, counsel for Warner-Lambert wrote a letter to the Court requesting that the action be dismissed for plaintiff's failure to comply with Local Rule

16. On January 4, 1982, Fennell personally wrote a letter to the Clerk of the District Court opposing Warner-Lambert's request that the case be dismissed (Petition, p. 10). Thus, it is beyond dispute that, as early as January 4, 1982, Fennell had actual knowledge that her case was in danger of being dismissed for lack of prosecution. Nevertheless, during the next year, Fennell did not take a single step to proceed with outstanding discovery matters.

At the time of the December 14, 1982 status conference, this case was almost five and a half years old. It related to events, some of which had occurred more than a decade earlier. A key witness having knowledge of the circumstances surrounding Fennell's 1974 termination had died. A number of other witnesses had left Warner-Lambert. The passage of time and the involvement of these witnesses in other activities had undoubtedly diminished their recollections as to the events in issue. The prejudice to Warner-Lambert was obvious (A109).

On December 29, 1982, Warner-Lambert moved to dismiss the action pursuant to Rule 41(b), Federal Rules of Civil Procedure, and Rule 16(a), the Rules of Civil Procedure of the United States District Court for the District of Connecticut, for plaintiff's failure to prosecute (A106-A107).

After a hearing on March 7, 1983, the District Court, on May 2, 1983, granted Warner-Lambert's motion to dismiss (A144-A153). In its opinion, the District Court found (A148) that plaintiff had never complied with the Rule 16 notice that was extended until September 22, 1981. The Court next considered plaintiff's excuse that defendant was to blame for the lack of prosecution. The District Court specifically found that such an excuse was "not supported by the record" (A149) since the parties

had an agreement, "long ago embodied in a stipulation and reflected in correspondence, that document production would precede other discovery" (A151).

In determining that dismissal rather than a lesser sanction was appropriate, the District Court held (A151):

> Given this procedural history, necessarily reviewed here at length, the Court cannot fairly avoid the conclusion that this case has not been prosecuted with due diligence. In addition to plaintiff's complete noncompliance with the Rule 16 order, plaintiff has taken no action to prepare her case for trial since the Court denied her motion for partial summary judgment. Although dismissal is a harsh remedy, it must be recognized that "[d]elays have dangerous ends, and unless district judges use the clear power to impose the ultimate sanction when appropriate, exhortations of diligence are impotent." *Chira* v. *Lockheed Aircraft Corp., supra* [634 F.2d 664] at 668 [2d Cir. 1980]. In this case, where plaintiff was put on notice of possible dismissal by a Rule 16 notice in 1981 but took no action until 1983, despite defendant's request for dismissal in late 1981, the Court reluctantly concludes that dismissal is appropriate.

On June 6, 1983, Fennell filed *pro se* a notice of appeal. On November 25, 1983, the Court of Appeals for the Second Circuit unanimously affirmed the dismissal. On March 13, 1984, Fennell's petition for rehearing and suggestion for rehearing *en banc* was denied. On June 11, 1984, Fennell filed *pro se* with this Court a petition for writ of certiorari.

Meanwhile, on May 4, 1984, Fennell filed *pro se* in the District Court of Connecticut a motion for relief from

judgment, which is scheduled for argument on July 13, 1984. On June 25, 1984, Fennell filed with the Court of Appeals for the Second Circuit a "Supplementary Petition for Rehearing/Motion For Recall of Mandate", which is currently pending.

ARGUMENT

I. No reason exists for granting the writ of certiorari.

As is obvious from the Petition itself, Fennell here seeks to have this Court review, still again, the facts found by the District Court and reviewed by the Court of Appeals. This Court, however, does "not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

None of the considerations which would justify the grant of a Petition for certiorari is apparent here. This case has no significance whatsoever to anyone other than the litigants. All that is involved here is the question whether the District Court abused its discretion in dismissing this case for lack of prosecution. The Second Circuit held that discretion had not been abused. No further review is called for or warranted.

II. The decision below was clearly correct.

Dismissal under Rule 41(b) for failure to prosecute is a matter of the trial court's discretion. *Link* v. *Wabash Railroad Co.,* 370 U.S. 626, 633 (1962). The District Court's opinion shows the care and deliberation with which Judge Burns reached the conclusion that dismissal here was the proper remedy.

The function of a reviewing court in such circumstances is limited: a Rule 41(b) dismissal for failure to prosecute is reversible only if an abuse of discretion has been shown. *Chira* v. *Lockheed Aircraft Corp.*, 634 F.2d 664, 666 (2d Cir. 1980); *Theilmann* v. *Rutland Hospital, Inc.*, 455 F.2d 853, 855 (2d Cir. 1972). As recently noted in *Lyell Theatre Corp.* v. *Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982):

> The scope of review of an order of dismissal is confined solely to whether the trial court has exercised its inherent power to manage its affairs within the permissible range of its discretion.

No abuse of discretion was shown, and the Second Circuit found that there had been no such abuse.

In reviewing the exercise of that discretion, an important policy consideration concerns the trial court's control of its docket necessary to achieve the orderly and expeditious disposition of cases, and its need to deter litigants and their counsel from disobeying court rules. *Chira* v. *Lockheed Aircraft Corp.*, 634 F.2d 664, 668 (2d Cir. 1980). *Cf. National Hockey League* v. *Metro Hockey Club*, 427 U.S. 639, 642-643 (1976). These policy considerations also strongly favor the District Court's decision. The case was almost six years old when the motion to dismiss was decided. There had been virtually no discovery; and plaintiff had failed, for well over a year, to comply with the notice under Local Rule 16.

Finally, as this Court made clear in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633-634 (1962), it is no defense to a motion to dismiss for lack of prosecution that the failure to prosecute was the fault of the lawyer rather than the client. Here, however, there is no need to reach even that issue since the record establishes that it was Fennell herself who prevented her case from proceeding.

Fennell was always free to obtain new counsel or cooperate with her existing attorney in prosecuting her case. For example, Fennell was copied on her counsel's letter to defendant's attorney dated January 19, 1981, which states that he would obtain instructions from her with respect to defendant's request for documents before the taking of her deposition (A131). Yet, as late as December 1982, a year after she was aware that her case was in danger of being dismissed under Local Rule 16 for failure to prosecute, Fennell apparently never gave her attorney any instructions as to how to respond. Thus discovery remained at a standstill for almost two years, from January 1981 until December 1982. Fennell is thus directly and personally responsible for the failure to prosecute which forms the basis for the District Court's dismissal.

CONCLUSION

For each of the reasons assigned, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STANLEY GODOFSKY
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Dated: July 10, 1984

Affidavit of Service

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

REX W. MIXON, JR., being duly sworn, deposes and says that, pursuant to Rule 28.3 of the Supreme Court Rules, he served the foregoing Brief upon petitioner by mailing on July 10, 1984, three true and correct copies thereof, first class mail postage prepaid to petitioner Geraldine Fennell, *pro se,* 59 Rennell Street, Bridgeport, Connecticut 06604.

REX W. MIXON, JR.

Sworn to before me this
10th day of July, 1984

Notary Public